

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

JESSE P.,)	
)	
)	2 CA-JV 2008-0117
Appellant,)	DEPARTMENT B
)	
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
ARIZONA DEPARTMENT OF)	Rule 28, Rules of Civil
ECONOMIC SECURITY and)	Appellate Procedure
SHELBI P.,)	
)	
Appellees.)	
)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. 16874800

Honorable Ted B. Borek, Judge

AFFIRMED

Peter G. Schmerl Tucson
Attorney for Appellant

Terry Goddard, Arizona Attorney General Tucson
By Michelle R. Nimmo Attorneys for Appellee Arizona
Department of Economic Security

E C K E R S T R O M, Presiding Judge.

¶1 Jesse P. challenges the juvenile court’s order terminating his parental rights to his three-year-old daughter, Shelbi P. As grounds for termination, the court found that Jesse

had abandoned Shelbi, *see* A.R.S. § 8-533(B)(1), and that, due to a felony conviction, he was serving a prison sentence of such length that Shelbi would be deprived of a normal home for a period of years. *See* A.R.S. § 8-533(B)(4). Jesse contends the Arizona Department of Economic Security (ADES) failed to present clear and convincing evidence to support the termination of his rights on either ground.

¶2 We will not disturb an order terminating parental rights as long as there is reasonable evidence to support the factual findings upon which the order is based. *Audra T. v. Ariz. Dep't of Econ. Sec.*, 194 Ariz. 376, ¶ 2, 982 P.2d 1290, 1291 (App. 1998). Stated differently, we will only reverse an order terminating a parent's rights if the order is clearly erroneous. *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, ¶ 4, 53 P.3d 203, 205 (App. 2002). And, provided there is sufficient evidence to sustain the juvenile court's order on one ground, we need not address the court's ruling as to any other ground. *See Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, ¶ 27, 995 P.2d 682, 687 (2000); *Jesus M.*, 203 Ariz. 278, ¶ 3, 53 P.3d at 205. We conclude reasonable evidence in the record supports the court's order terminating Jesse's rights on the ground of abandonment, and we affirm.

¶3 Child Protective Services (CPS) first took Shelbi into temporary custody shortly after her birth in December 2005 after investigating a report that her mother, Jesse's wife Lorraine B., had interfered with the hospital's attempt to screen the infant for exposure to drugs.¹ In February 2006, the juvenile court ruled Shelbi a dependent child after both

¹Jesse and Lorraine's first child together, Jesse Jr., had tested positive for cocaine at birth in 2004, and Jesse's parental rights to him were terminated in February 2005 on grounds of abandonment and length of time in care. § 8-533(B)(1), (8)(a). Lorraine's parental rights

parents admitted the allegations in an amended dependency petition. Although the court awarded ADES legal custody, it placed Shelbi with Jesse and Lorraine. The court dismissed the in-home dependency in August 2006, based on ADES's motion and the CPS case manager's report that Jesse and Lorraine were providing a safe and appropriate home for Shelbi; that Jesse was steadily employed; and that both parents had successfully participated in the services CPS had offered, which included random drug testing, parenting classes, and the assistance of a parent aide.

¶4 According to testimony at the termination hearing, Jesse and Lorraine separated approximately five months after the dependency was dismissed, and Shelbi remained primarily with Lorraine. In April or May 2007, Lorraine began leaving Shelbi in the care of family friends, Letizia B. and Francisco G. In June, Jesse was arrested and held on a charge of felony shoplifting. He was convicted in November 2007 and sentenced to 1.5 years in prison, and he remained in custody from the time of his arrest in June 2007 through the September 2008 termination hearing.²

¶5 After his arrest, Jesse had no contact with Lorraine or Shelbi and did not know their whereabouts, as Lorraine had become homeless and was living from place to place. On the night of September 14, 2007, CPS learned that Lorraine had left Shelbi in a hotel room

to Shelbi, Jesse Jr., and her son from an earlier relationship have also been terminated. She has not appealed those decisions.

²At the time of the termination hearing, Jesse had technically been released to the community supervision portion of the sentence for his original conviction, but he remained in custody pending trial on a new charge of possessing prison contraband.

at 9:00 that morning with a drug-user—known to Lorraine only as “Red”—and had not returned as expected. CPS took Shelbi into protective custody and placed her with Letizia and Francisco, where she remained throughout these proceedings.³

¶6 Jesse learned of Shelbi’s circumstances only after CPS contacted him in September 2007. According to the CPS investigator who spoke with him, Jesse was not surprised by the report that Lorraine had been using crack cocaine. Although Jesse had not heard from Lorraine since his arrest, he told the investigator, “We argued all of the time about her using crack. She had been clean for [two] years and got pissed one day and left for [three] days.”

¶7 Shelbi was adjudicated dependent for the second time in October 2007 after Jesse admitted the allegations in another amended dependency petition. Jesse testified he stayed informed of Shelbi’s situation during the dependency by appearing, in most instances telephonically at court hearings and foster care review board (FCRB) hearings, and he had requested and received two photographs of her from Letizia. He also successfully sought visitation with Shelbi at the prison and saw her there on two occasions. However, although CPS had assigned the same case manager who had worked with Jesse and Lorraine in Shelbi’s first dependency, Jesse never contacted him during this second dependency proceeding. Nor did he request telephone contact or send cards, gifts, or letters for Shelbi, with the exception of one card on which Lorraine appeared to have signed his name.

³Letizia testified that she is willing to adopt Shelbi.

¶8 After a June 2008 permanency hearing, ADES filed a motion to terminate Jesse’s parental rights. Based on the evidence and testimony presented at the contested termination hearing, the juvenile court concluded Jesse had abandoned Shelbi and that, in light of all the relevant circumstances, his sentence was of such a length that Shelbi would be deprived of a normal home for at least two years.

Abandonment

¶9 Section 8-531(1), A.R.S., defines abandonment as

the failure of a parent to provide reasonable support and to maintain regular contact with the child, including providing normal supervision. Abandonment includes a judicial finding that a parent has made only minimal efforts to support and communicate with the child. Failure to maintain a normal parental relationship with the child without just cause for a period of six months constitutes prima facie evidence of abandonment.

In keeping with this definition, the juvenile court found termination was justified pursuant to § 8-533(B)(1) because Jesse had “made only minimal efforts to support and communicate with [Shelbi]”; had failed to maintain a normal parental relationship with her; and had failed to provide her with reasonable support, regular contact, or normal supervision, both before and after his incarceration.

¶10 Jesse argues the court’s findings are erroneous. He asserts the evidence established that he saw Shelbi every day before he was incarcerated. Although he acknowledges that he arguably “could have done more” to provide support and maintain contact with her during his incarceration, he contends his efforts to establish visitation, his

appearances at court and FCRB hearings, his request for photographs, and the card he sent to Shelbi through Lorraine were sufficient to defeat the allegation of abandonment.

¶11 “What constitutes reasonable support, regular contact, and normal supervision varies from case to case,” and abandonment, which is “measured not by a parent’s subjective intent, but by [his] conduct,” presents a question of fact to be resolved by the juvenile court. *Michael J.*, 196 Ariz. 246, ¶¶ 18, 20, 995 P.2d at 685-86, quoting *In re Pima County Juv. Action No. S-114487*, 179 Ariz. 86, 96, 876 P.2d 1121, 1131 (1994). We view the evidence in the light most favorable to affirming that court’s findings, *see id.* ¶ 20, recognizing that, “as the trier of fact in a termination proceeding,” a juvenile court “is in the best position to weigh the evidence, observe the parties, judge the credibility of witnesses, and resolve disputed facts.” *Ariz. Dep’t of Econ. Sec. v. Oscar O.*, 209 Ariz. 332, ¶ 4, 100 P.3d 943, 945 (App. 2004).

¶12 In this case, the juvenile court found Jesse had “maintained some contact with Shelbi” after he and Lorraine separated in January 2007 until his arrest in June. But the court could reasonably have inferred that Jesse saw Shelbi sporadically, rather than routinely, and had not been involved in her regular care during those months. Jesse testified that, after the couple had separated, “sometimes [Lorraine] would come by every day, every other day, depending where I was working, where I was at. . . . Sometimes I would keep [Shelbi] like a day or two until [Lorraine] c[a]me back.” Similarly, although Jesse had implied that Letizia and Francisco had not provided care for Shelbi until two days before his arrest in June, Letizia testified that Lorraine had been leaving Shelbi with them since April or May. The

court may have found Letizia more credible on this point and reasonably could have inferred Jesse was unaware of childcare arrangements for Shelbi because he had not been providing normal supervision for her. The court also may have found the absence of a normal parental relationship evident from Jesse's response when asked whether he had considered, before committing the felony that resulted in his imprisonment, the consequences his conduct would cause for Shelbi. Jesse had answered, "I didn't think about it. Right at the time, me and [Lorraine] was having marital difficulties and we was kind of like—you might as well say separated. We see each other and talk but we wasn't actually living together." From Jesse's September 2007 statement to a CPS investigator that he had not heard from Lorraine since his arrest but that the two had argued frequently about her cocaine use, the court also may have inferred that Jesse had known before June 2007 about Lorraine's relapse into drug use but had taken no steps to protect Shelbi. Moreover, as ADES points out, between June and September 2007, when Jesse did not know where Lorraine and Shelbi were, he made no effort to find them. Even though he knew in June that Letizia and Francisco had provided care for Shelbi and knew Francisco's business address, he never contacted them to inquire about Shelbi.

¶13 Jesse is correct that imprisonment, in and of itself, does not warrant termination on the ground of abandonment. *Michael J.*, 196 Ariz. 246, ¶ 22, 995 P.2d at 686. But neither does it provide a defense. *Id.* Instead, a parent whose "circumstances prevent [him] from exercising traditional methods of bonding with his child . . . must act persistently to establish the relationship however possible" and assert his legal rights vigorously "at the first and

every opportunity.” *Id.* ¶¶ 22, 25, quoting *Pima County No. S-114487*, 179 Ariz. at 97, 876 P.2d at 1132. Although his visitation with Shelbi in prison had been delayed until the spring of 2008, Jesse failed to communicate regularly with Shelbi or her foster parents in the interim through cards, letters, or telephone calls, all means of contact that were presumably available to him.

¶14 Moreover, we conclude the language in *Michael J.* applies equally to Jesse’s argument in his reply that, from January 2007 until his arrest in June, his separation from Lorraine had “temporarily interfere[d] with” his relationship with Shelbi. Just as imprisonment “does not justify a [parent’s] failure to make more than minimal efforts to support and communicate with his child,” *id.* ¶ 21, separation from a spouse does not justify abdicating parental obligations.

¶15 We conclude substantial evidence supports the juvenile court’s order terminating Jesse’s parental rights to Shelbi based on abandonment.⁴ Accordingly, we affirm.

PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

J. WILLIAM BRAMMER, JR., Judge

GARYE L. VÁSQUEZ, Judge

⁴In light of our decision, we do not address Jesse’s request to consider his release from custody as evidence the juvenile court abused its discretion in terminating his rights pursuant to § 8-533(B)(4).